In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 666

DON BERTRAM PRATT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 412 F. 2d 426.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1969. A petition for rehearing was denied on August 29, 1969. The petition for a writ of certiorari was filed on September 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Universal Military Training and Service Act, as amended by the Military Selective Service Act of 1967, particularly in providing for the deferment of college students, is constitutional.

2. Whether petitioner may challenge the legality under international law of the Vietnam conflict as a defense to a prosecution for failure to submit to induction into the Armed Forces.

3. Whether the Selective Service laws may constitutionally be applied to require induction into the Armed Forces of a person who opposes the Vietnam conflict.

STATEMENT

Petitioner was convicted in the United States District Court for the Western District of Kentucky for wilfully refusing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462 (a). On April 8, 1968, he was sentenced to imprisonment for five years and fined $10,000.

On September 20, 1962, petitioner registered with his local Selective Service board. On July 12, 1967, after petitioner had been a student at the University of Kentucky for over five years, he was classified I-A. For a time during those five years he held a II-S or student deferment.[1] On January 26, 1968, after he had previously refused to report for a physi-

[1] He had successfully completed the ROTC program at college, but had refused to accept a commission as an Army officer (Pet. App. F, 28a-29a).

cal examination, he was ordered to report for induction. At the induction center he refused processing—the taking of various tests and a physical examination—and refused to submit to induction.

At trial petitioner admitted that he failed to submit to processing at the induction station. He asserted that if he had taken the physical examination, he might have been physically disqualified for military service and thus would not have been able to express his disagreement with the Vietnam conflict by refusing induction. He said that he could not serve in the Armed Forces because he might be forced to disobey military orders which violated international law (Pet. App. E, 29a-31a).

ARGUMENT

1. Petitioner concedes that Congress has the constitutional authority to require compulsory military service, and further that Congress may lawfully provide for certain limited exemptions of individuals from service. Essentially, his argument is that the present draft law, as written and administered, violates due process by allowing deferments to all college students and thereby discriminating "against persons of lower socio-economic status, particularly with respect to the burden of rendering combatant service" (Pet. 20). Since petitioner himself was the beneficiary of a student deferment, he hardly has standing to claim that such deferments give "those in the favored class the opportunity to choose the time of their service, [and] substantially [reduce] the probability that if and when they do serve, they will

have to perform combatant service" (Pet. 23). See *Taimanson* v. *United States*, 386 F. 2d 811 (C.A. 1), certiorari denied, 391 U.S. 907. In any event, the "constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States* v. *O'Brien*, 391 U.S. 367, 377. In the exercise of that power, Congress may provide for exemption from service for some persons and delayed service for others, so long as the scheme is not wholly lacking in rationality. See *Korte* v. *United States*, 280 F. 2d 633 (C.A. 9), certiorari denied, 358 U.S. 928.[1]

2. Petitioner's contention that the Vietnam conflict is illegal since allegedly in violation of international law was properly rejected. This claim raises a political question and, in any event, provides no defense to a prosecution for failure to submit to induction into the Armed Forces. *United States* v. *Mitchell*, 369 F. 2d 323 (C.A. 2), certiorari denied, 386 U.S. 972; *United States* v. *Prince*, 393 F. 2d 686, 688 (C.A. 2), certiorari denied, 393 U.S. 946; *Ashton* v. *United States*, 404 F. 2d 95, 97 (C.A. 8), certiorari denied, 394 U.S. 960.

3. The remaining issue presented in this case—the claim that petitioner may contest his induction into the Armed Forces on the ground that he opposes the Vietnam conflict on other than religious grounds—is at least arguably embraced within the questions

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[1] See also *Boyd* v. *Clark*, 393 U.S. 816, and the discussion in the government's motion to dismiss or affirm filed in that case (No. 490, 1968 Term).

presented in *United States* v. *Sisson*, No. 305, this Term, jurisdiction postponed to the merits, October 12, 1969. Unlike *Sisson*, however, the district court made no finding here as to the sincerity of petitioner's objection to the Vietnam conflict, and petitioner has of course never sought conscientious objector status.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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